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No. 1023

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit,

and

BRIEF IN SUPPORT THEREOF.

CHAS. M. HAY and
S. D. FLANAGAN,
506 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Fifth Circuit.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster, and others, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on March 4, 1941, reversing a judgment of the District Court of the United States within and for the Dallas Division of the Northern Judicial District of Texas in favor of your petitioner and against respondent herein.

OPINIONS BELOW.

The oral opinion, findings of fact, conclusions of law, and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Section 347. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered March 4, 1941 (R. 304). A petition for a rehearing was filed March 24, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 305), and the petition for a rehearing was denied April 2, 1941 (R. 310).

QUESTIONS PRESENTED.

1. Whether in a case where employees of a railroad company subject to the Railway Labor Act have organized, and by a majority vote have elected and designated a representative for collective bargaining purposes, and have so informed their employer, and have requested a conference for the purpose of making an agreement with respect to wages and working conditions, the employer may without first exerting every reasonable effort to make an agreement covering rates of pay, rules and working conditions, as required by Sec. 2 of the Railway Labor Act, and by unilateral action by notice served on the employees indi-

vidually, and over their protest, effect a change in their working conditions.

2. Whether under the circumstances related in the preceding question, a railroad company employing redcaps at its terminal under an arrangement by which it pays them no wages, but permits them to retain all tips received, has complied with Section 6 of the Fair Labor Standards Act of 1938, where it has served a notice on the redcaps,, against which they protest, and to which they at no time consent, that commencing with the effective date of said act they will be required to report daily all tips received, and that the company guarantees to each redcap continuing in service compensation which, together with the tips received, will not be less than the minimum wage provided by law, and that the redcaps are privileged to retain, subject to there being credited on such guarantee, all tips received, except such portion thereof as may be required to pay taxes imposed upon the redcaps and collectible by the company.

STATUTES INVOLVED.

The statutes involved are Sections 3 (m), 6 (a) and 11 (c) of the Fair Labor Standards Act of 1938, c. 676; Sections 3 (m), 6 (a) and 11 (c), 52 Stat. 1060, U. S. C. A., Title 29; Sections 203 (m), 206 (a) and 211 (c), and Section 2 of the Railway Labor Act, as amended, c. 347; Section 2, 44 Stat. 577, as amended June 21, 1934, c. 691; Section 2, 48 Stat. 1186, U. S. C. A., Title 45, Section 152.

The provisions of the Fair Labor Standards Act of 1938 primarily involved are:

> Section 3. As used in this chapter—
>
> * * * * * * *
>
> (m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator,

to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Section 6.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour.

(2) during the next six years from such date, not less than 30 cents an hour.

Section 11.

* * * * * *

(c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

The provisions of the Railway Labor Act primarily involved are:

Section 2. First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any

carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

STATEMENT OF THE FACTS AND THE MATTER INVOLVED.

This suit was instituted by petitioner, who had been duly designated as agent and representative of certain redcap employees of the respondent at its passenger terminal in Dallas, Texas, as their agent and representative pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, by filing a complaint in the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas, to recover for said redcaps unpaid minimum wages alleged to be due them under Section 6 (a) of said Act, together with an equal amount as liquidated damages and attorney's fees.

For more than thirteen years said redcaps had been employed by respondent, receiving no wages, but depending solely on tips or gratuities of passengers whom they served. On September 29, 1938, the Interstate Commerce Commission acting under authority conferred upon it by Section 1, Fifth, of the Railway Labor Act, in a proceeding before it known as Ex Parte 72 (Sub. No. 1), held that redcaps at stations and cities of over one hundred thousand population were employees for the purposes of the Railway Labor Act (R. 195). Thereafter, on October 11, 1938, all of the redcaps involved in this action, constituting almost all the redcap employees of respondent, and

a majority of said employees, executed and delivered to respondent an instrument (R. 139-141) whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as their duly authorized and accredited representative for the purposes of the Railway Labor Act, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do all other things in connection therewith having for its purpose the making and maintaining of an agreement between respondent and said redcaps. On the same date plaintiff herein, who is General Chairman of said Union Terminal System Board of Adjustment, wrote respondent's vice-president and general manager (R. 142-143) advising him of the ruling of the Interstate Commerce Commission holding that redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exihibit to it the authorizations that were executed by the redcaps, and were asking for a conference under the terms of the Railway Labor Act for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said board of adjustment to act for the redcaps, and (2) for the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter concluded with a request that petitioner be advised of the time, date and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

Respondent did not answer this letter of petitioner, but on October 22, 1938, served upon each redcap employed by it a notice (R. 127) informing him that in view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of his thereafter engaging in the handling of hand baggage of passengers or otherwise assisting them, it would be necessary that he report daily to respondent the amount received by him as tips or remuneration for such services, and that respondent guaranteed to each person continuing such service after said date compensation which, together with and including the sums of money received as above stated, would not be less than the minimum wage provided by law, and that he was privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration received by him except such portion thereof as might be required of him by respondent for taxes of any character imposed upon him by law and collectible by respondent.

The redcaps did not reply individually to this notice, but petitioner, as their representative, wrote a letter to respondent's vice-president and general manager October 24, 1938 (R. 128), protesting against the arrangement sought to be imposed by respondent set forth in the notice of October 22, 1938. Thereafter petitioner and respondent's general manager conferred with a view of negotiating a working agreement covering the redcaps employed by respondent. During the period covered by these conferences respondent's vice-president, under date of December 6, 1939, wrote a letter (R. 153) to petitioner referring to a proposed agreement and stating "as I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day is in the Court, and as soon as same is decided, we will be glad to negotiate an agreement with the Clerks' Union of which you are the general chairman for the company." A work-

ing agreement was finally entered into between respondent and the Brotherhood of Railway and Steamship Clerks, effective January 1, 1940, rule 16 of which (R. 134) provided that if a redcap was improperly suspended or dismissed, and after a hearing was reinstated, he should be reimbursed for any money losses suffered, provided that it was subsequently determined that under the provisions of the Fair Labor Standards Act the carrier was required to pay a wage to the redcap over and above any amounts that might be received by him as tips. Testimony was introduced to the effect that from October 22, 1938, to the date of the trial, the redcaps at no time withdrew their protest against the arrangement described in respondent's notice of October 22, 1938 (R. 199 and 206).

During the period from October 24, 1938, to February 28, 1939, each of the redcaps reported daily on a form furnished by respondent the amount of tips he had received, and respondent twice each month paid, in every case where the tips reported did not equal the minimum wage provided by the Fair Labor Standards Act, the difference between the tips reported and the minimum wages earned during the preceding half month. During the period from March 1st to October 15th, 1939, the redcaps, pursuant to instructions of respondent, did not report their tips, but respondent advised them that it would assume, unless reported to the contrary, that for each work period after February 28, 1939, each redcap collected in tips at least an amount equivalent to the number of hours worked multiplied by 25 cents, and that should any redcap receive less than said amount during any work period, he should report it to respondent, and respondent would pay any difference between the amount of tips collected and the amount produced by multiplying the number of hours worked by 25 cents, and that each of said redcaps should fill in a form showing the hours worked during the day

for each day worked. It was agreed that during this period each redcap collected in tips during each work period an amount equal to or in excess of the number of hours worked during the work period multiplied by 25 cents. From October 16, 1939, to March 6, 1940, the day preceding the filing of this suit, each red cap reported daily the tips he received, and where the tips received during any work period were less than the minimum wages earned, defendant paid the difference between the tips and the minimum wages.

Judgment was entered by the District Court in favor of petitioner and against respondent (R. 39-41) for unpaid minimum wages in the sum of $38,626.99, liquidated damages in an equal amount, and attorney's fees in the sum of $500.00, totaling $77,753.98. The District Court based its decision on the grounds that the payment of tips by the public to the employee of another was a gift to that employee, and in the absence of any contract between the employee and employer that such tips should be the property of the employer, they remained the property of the employee, and that a gratuity paid by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum. The Court referred to petitioner's letter to respondent's vice-president and general manager, dated October 24, 1938, the letter of this official dated December 6, 1939, and rule 16 of the working agreement of January 1, 1940, and held that under these circumstances there was no meeting of the minds of the parties on the terms of respondent's notice of October 22, 1938, and that consequently, the notice did not effect any change in the existing arrangement between the parties; that, therefore, the tips remained the property of the redcaps, and could not be considered payment of wages by respondent (R. 286-290).

The Circuit Court of Appeals for the Fifth Circuit in a majority opinion written by Judge Sibley and concurred in by Judge Foster (R. 301) followed its opinion in the case of Williams v. Jacksonville Terminal Company, 118 F. (2) 324, decided by it the same day, and reversed the judgment of the District Court, and remanded the cause for further consistent proceedings (R. 304). The Court reasoned that it did not appear that the moneys collected by the redcaps were personal gifts and not compensation for the service which respondent hired them to perform, and that no contract was necessary to make the tips the money of the company; that although they did not agree to the plan stated in respondent's notice of October 22, 1938, they did continue to work and collected money for their services and accounted for it as required, and that the law intervened to make respondent owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. The Court held that petitioner's argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, could not be sustained; both because there was no collective agreement that the tips should belong to the redcaps, and because a collective agreement would not avail against changes wrought by a statute.

Judge Holmes, dissenting, held that the word "tip" should be given its usual and ordinary meaning, and that if what the redcaps received were gifts or gratuities, they had the right to keep them for themselves, and that if Congress had intended that tips should be included in the meaning of the word "wages" it would have said so.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the tips received by the redcaps were not personal gifts to the redcaps, but were compensation for services which respondent hired them to perform, so that no contract was necessary to make the tips the property of respondent.

2. In holding that the Fair Labor Standards Act had intervened to make respondent owe the redcaps a stated wage, and in consequence to deprive them of the tips which the Court said were previously their compensation.

3. In holding that even though a majority of the redcaps had designated a representative under the Railway Labor Act for collective bargaining purposes, and a conference had been requested of respondent by said representative to negotiate a working agreement for said redcaps, respondent by unilateral action on its part and without exerting every reasonable effort, as required by Section 2 of the Railway Labor Act, to make an agreement with the redcaps, could effect a change in the existing arrangement under which the tips belonged to the redcaps so as to appropriate said tips for the payment of the minimum wage.

4. In holding that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent, as said notice did not claim ownership of the tips, but merely offered to pay any difference between the minimum wages and the tips received on the theory that tips were wages under the Fair Labor Standards Act.

5. In holding that the accounting and guarantee plan was a compliance with the Fair Labor Standards Act because the plan will not carry out the purposes of Congress,

since it permits of easy evasion of the obligations imposed thereby, shifts the burden of keeping records from the employer to the employee, although Section 11 (c) of the Act requires the employer to keep records necessary to show compliance with the act, and is conducive to labor disputes burdening and obstructing commerce.

6. In failing to hold that in the absence of an agreement to the contrary, tips received by the redcaps were their property, and were not under the Fair Labor Standards Act wages paid by respondent, and that there was no agreement between the parties that the tips should be the property of respondent, and hence judgment in favor of petitioner should have been affirmed.

REASONS FOR GRANTING THE WRIT.

I.

Petitioner submits that this Court should issue its writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit because said Court has decided important questions of federal law which have not been, but should be, settled by this Court, these questions being heretofore set forth under "Questions Presented" on page 2 of this petition. The determination of these questions involves the construction of two important federal statutes, the Fair Labor Standards Act of 1938 and the Railway Labor Act.

The determination of these questions by this Court is of great public importance, in order that this Court may set at rest much doubt, avoid a multiplicity of suits, and furnish the Administrator of the Fair Labor Standards Act, and employers and employees in tipping occupations subject to the act, with a certain guide so that they may comply with the act.

The present suit is only one of many now pending in

various District Courts of the United States in which similar questions have been raised as to whether tips received by redcaps and reported to their employers under the accounting and guarantee plan may be considered payment of wages by their employers under that act. Your petitioner has knowledge of the following cases pending and awaiting trial in District Courts of the United States: Eugene Frazier et al. v. The Cleveland Union Terminals Co., Northern District of Ohio, Eastern Division; Willard Saxby Townsend et al. v. Boston & Maine Railroad, District of Massachusetts; Willard Saxby Townsend et al. v. H. S. Palmer, M. M. Daniels and J. L. Loomis, as Trustees of the New York, New Haven & Hartford Railroad Co., District of Massachusetts; Willard Saxby Townsend v. The Cincinnati Union Terminal Co., Inc., Southern District of Ohio, Western Division; Willard Saxby Townsend et al. v. The Indianapolis Union Railway Co., Southern District of Indiana, Indianapolis Division; Willard Saxby Townsend v. The Union Depot Company, Southern District of Ohio, Eastern Division; Willard Saxby Townsend et al. v. Tulsa Union Depot Co., Northern District of Oklahoma; Willard Saxby Townsend et al. v. The Washington Terminal Company, District of Columbia; William D. Ryan etc. v. The Denver Union Terminal Company, District of Colorado. The case of Willard Saxby Townsend et al. v. The New York Central Railroad Company et al. has been tried and submitted to the District Court of the United States for the Northern District of Illinois, Eastern Division. Three other cases have been tried, one being George M. Harrison etc. v. Terminal Railroad Association of St. Louis, decided in favor of defendant, and which will be appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and the case of George M. Harrison etc. v. Kansas City Terminal Railway Company, 36 F. Supp. 434, which has been decided in favor of defendant, and ap-

pealed to the United States Circuit Court of Appeals for the Eighth Circuit. Another case, James E. Taylor et al. v. Pennsylvania-Reading Seashore Lines, Inc., was decided April 19, 1941, in favor of the defendant, and if appealed, will go to the United States Circuit Court of Appeals for the Third Circuit. Thus it appears that cases similar to the case at bar involving a construction of the same sections of the Fair Labor Standards Act construed by the United States Circuit Court of Appeals for the Fifth Circuit will likely be submitted to the United States Circuit Courts of Appeal for the First, Third, Sixth, Seventh and Eighth Circuits. An authoritative decision by this Court of the questions involved in the construction of the Fair Labor Standards Act will likely dispose of most of these cases, or if not, will be of great value to these courts in reaching a correct decision.

The fact that the question involved here, as to whether an employer may comply with the Fair Labor Standards Act by paying only the difference between tips reported by his employees and the minimum wage under an accounting and guarantee plan, is of great public importance, is evidenced by the fact that the Administrator of the Fair Labor Standards Act has seen fit to institute two suits under section 17 of the act for injunctions against terminal companies to enjoin them from continuing with the plan, one of these cases being Philip B. Fleming, as Administrator of the Wage and Hour Division, United States Department of Labor, v. Cincinnati Union Terminal Company, Inc., and the other being a similar action against the Cleveland Union Terminal Company. After the filing of the case against the Cincinnati Union Terminal Company, the company abandoned the accounting and guarantee plan, and on its contention that the case thereby became moot, it was dismissed by the District Court. The decree of the District Court was, however, reversed and the case remanded for

further proceedings by the Circuit Court of Appeals of the Sixth Circuit, 117 F. (2d) 1012. Further evidence of the great public importance of the questions involved is the fact that the Administrator of the Fair Labor Standards Act filed briefs as amicus curiae in the case at bar, in the case of Williams et al. v. Jacksonville Terminal Company, heard and decided contemporaneously with this case by the Circuit Court of Appeals for the Fifth Circuit, and in other cases, including the cases at St. Louis, Kansas City and Chicago.

The filing of the case by the Administrator against the Cincinnati Union Terminal Company followed the adoption by him of the recommendations made by Gustav Peck, Assistant Chief of the Hearings and Exemptions Section of the Wage and Hour Division, who conducted a hearing on June 27th and 28th, 1939, on the record-keeping practices used by railroads and terminals in the employment of redcaps. Mr. Peck in his report, adopted by the Administrator, found that the pay-roll records of the railroads for redcaps generally did not accurately record the data as to wages paid, and he stated that it appeared that there was grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers were using, and recommended that the Wage and Hour Division take immediate steps through court action to determine the validity of the arrangement (1941 CCH Labor Law Service, Section 33208, 4 Fed. Reg. 4252).

The decision of the Circuit Court of Appeals in this case, if permitted to stand, will have far-reaching effect, for it will approve a means and method which not only railroads may adopt as to their redcap employees, but which any employer in tipping occupations may adopt to evade the plain terms of the statute requiring every employer to pay each of his employees within the act wages at the specified

rates. We believe this explains the unusual interest which the Administrator of the Fair Labor Standards Act has taken in these cases.

In his brief annexed hereto petitioner has set forth reasons why he believes the Circuit Court of Appeals erred in its decision, and will not reiterate his criticism of the decision here, except to point out that the unusual effect ascribed to the Fair Labor Standards Act of ipso facto changing the ownership of tips from the redcaps to the respondent, and the Court's statement that even though there was a collective agreement that the tips should belong to the redcaps, this "collective agreement would not avail against changes wrought by a statute" are so startling as to call for the exercise by this Court of its discretionary power to review the decision of the Circuit Court of Appeals to the end that if said Court erred, the error may be corrected.

II.

Petitioner respectfully submits that this Court should issue its writ of certiorari herein for the further reason that another important question of federal law which has not been, but should be, settled by this Court, was decided by the Circuit Court of Appeals, that is, whether a railroad company subject to the Railway Labor Act, after its employees have organized and designated a representative for collective bargaining purposes, and said representative has requested a conference for the purpose of making an agreement with respect to wages and working conditions, can by unilateral action on its part, and without first asserting every reasonable effort to make an agreement covering said employees, change their working conditions over their protest.

The authoritative settlement of this question by this Court is of great public importance as the construction

of the Railway Labor Act, an important federal statute governing the relation of the nation's railroads and their employees, is involved. Section 2 of the Railway Labor Act imposes the duty on both the carriers and their employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. Such arbitrary conduct as respondent was guilty of in this case is not conducive to harmonious relations between carriers and their employees, and is, as we shall more fully point out in our brief in support of this petition, contrary to both the letter and spirit of the Railway Labor Act. Petitioner respectfully submits that this Court should settle this question of the construction of the Railway Labor Act so that both employers and employees subject thereto may definitely know their rights and liabilities thereunder.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

CHAS. M. HAY and
S. D. FLANAGAN,
Attorneys for Petitioner.

May, 1941.